

Channel 4 response to the European Commission's draft Communication on the Application of State Aid Rules to Public Service Broadcasting

The public service broadcasting environment

Channel 4 welcomes the opportunity to respond to the Commission's Draft Communication on the Application of State Aid Rules to Public Service Broadcasting ('The Communication').

The Commission's revision of the Communication comes at a critical moment, as broadcast media stands at the cross-roads of convergence and increasingly rapid take-up of digital technologies. For public service broadcasters, the transition to digital poses a number of challenges and opportunities – both in terms of funding and the fulfilment of public purposes. The Commission has rightly recognised that these developments in the media – and in broadcasting in particular – make it appropriate to re-visit the Communication to ensure it is fit for purpose for the digital age.

As the Commission will be aware, there is currently extensive debate taking place in the UK about the future of public service broadcasting and issues around a fully-connected, digitally enabled Britain. There is wide recognition that a new model of public service broadcasting is required in the UK; and some important policy and regulatory decisions are due to be made in the UK in the coming months. Ofcom, the national regulatory body, is very shortly due to publish the conclusions of its Second Review of Public Service Broadcasting (PSB Review) which is likely to set out a range of recommendations for the UK Government in respect of a revised PSB regime. Soon afterwards, the UK Government is expected to publish its interim Digital Britain Report, looking at a broad range of issues, from next generation broadband access to issues around content and public service broadcasting. Later this year, the Government is expected to publish its final Digital Britain report which is expected to set out the way in which it proposes to structure public service broadcasting in the UK in the digital age.

Whilst we are extremely keen that the Communication should be appropriately updated, our overriding observation is that this is not primary legislation and should not be treated with such status. The foremost consideration that must be given to any application for State Aid must be its compatibility with Article 87(3) and/or Article 86 of the EC Treaty rather than be considered against an overly strict application of the Broadcasting Communication. A Broadcasting Communication may not always be able to grapple with all of the complex issues or individual characteristics in relation to State Aid for public service broadcasting (PSB); nor will its application necessarily relate in the same way to dual funded public service broadcasters as to wholly funded broadcasters. As the PSB sector continues to evolve, we are concerned that no single piece of guidance can fully interpret the Treaty in every case or be applied through a 'one size fits all' interpretation. As such, it is essential that there is sufficient flexibility so that where the facts in any particular case mean that the approach in the Broadcasting Communication is inappropriate and would lead to a misapplication of the EC Treaty provisions, the Commission can decline to apply the whole or any part of it.

About Channel 4

Channel 4 is a commercially funded, publicly owned public service broadcaster. As such, Channel 4 is focused exclusively on the fulfilment of its public service objectives, as set out in statute and its licence to broadcast. Channel 4 has a remit to innovate, take risks and provide diversity. As part of a mixed programme offer, it has particular obligations around news, current affairs and education. As a publisher-broadcaster, with no in-house production – Channel 4 has a particularly strong role in supporting the independent production sector. Through high levels of originally commissioned programming Channel 4 therefore plays an important role in supporting the UK Creative Economy, and by making an important cultural, democratic and social contribution to British life.

At present, Channel 4's remit relates to the core television channel, Channel 4. Alongside this, Channel 4 Corporation (C4C) operates a number of additional services (including E4, Film 4 and More 4 and the on-demand service 4oD) that do not formally form part of its public service remit but which support the ongoing commercial viability of the core television Channel. All profits generated by these services (which include a portfolio of digital channels and activities on digital platforms, such as the on-demand service 4oD) are reinvested in the public service remit.

In Spring 2008 Channel 4 set out a bold and ambitious blueprint for the public service role the organisation should play in the digital age. The document – *Next on 4* – underlined the growing importance of Channel 4's public service role in providing plurality to the BBC, building on its traditional role across a broader public service 'network', including its other channels and with a commitment to innovating in online content.

Although Channel 4 is currently 100% commercially funded, a number of measures are in place to ensure that there is accounting separation between the core public service and the commercial ventures. These measures are approved by the UK regulator Ofcom and independently audited annually. Channel 4 also publishes its annual report and accounts to the UK Parliament. Although commercially funded, Channel 4 has undertaken to publish an annual public value report, which will provide further qualitative and quantitative assessment of the contribution Channel 4 makes.

Comments on the Draft Communication

Channel 4 welcomes a number of the principles set out in the Commission's draft, in particular the intention to make the revision of the Communication in a 'future oriented manner' and the recognition of the unique nature of PSB.

Channel 4 believes that there are a number of principles that need to be enshrined in the Communication. We believe there needs to be a careful balance between enabling commercially funded innovation to flourish, with ensuring that enlightened intervention can be made in those areas where the market cannot or will not provide. It needs to be flexible and future-proof and should resist any attempt to establish a 'one size fits all' approach given the different characteristics and remits that exist not only across Member States, but also within different broadcasters within a single Member State. It is therefore crucial that Member States have sufficient scope to define and organise

public service broadcasting according to each market and the social, democratic and cultural needs of its citizens.

Channel 4 has the following specific comments to make on the Commission's current draft:

Definition of remit

Channel 4 believes that it is fundamentally important that Member States have the jurisdiction to define and structure public service broadcasting. Channel 4 believes that this needs to be made explicitly and prominently clear in the final Communication.

Audiences in different Member States will have different needs and priorities. Member States have different broadcasting heritages and need to respond to different market conditions. Even within a Member State, individual broadcasters can serve different and distinctive purposes, such as in the UK where the BBC and Channel 4 play complementary roles, and as such will be subject to different remits and regulatory regimes.

Channel 4's remit is defined in statute and articulated in detail in the licence to broadcast, issued by Ofcom. Channel 4 has a very particular and highly valued role, based around innovation, distinctiveness and risk-taking. Specific obligations in the licence include, for example, quotas relating to programme genres and production. The remit has been developed to address the needs of the UK audience and the role that Channel 4 plays as part of the UK's PSB ecology.

The Communication must avoid being overly prescriptive and enable a broad range of different PSB models to flourish. The Communication should be principles-led, establishing the core requirement for Member States to put in place remits where public funding is used. But it should stop short of specifying examples of what is and is not appropriate. The combination of the remit and appropriate measures to assess the market impact and public value of publicly funded activities (discussed below) are sufficient to ensure that public funding is allocated appropriately.

Governance

The Communication should not be prescriptive about the type of governance arrangements that are appropriate on a uniform basis across all EU Member States. In the UK, governance arrangements have been devised for the BBC for its structure and purposes. Such structures would not necessarily be appropriate for all broadcasters; rather decisions about governance should be made on a case by case basis, taking into account the remit of the broadcaster and the level of funding involved. The Communication should go no further than requiring Member States to put in place appropriate governance and accountability arrangements.

Assessment of new services:

While Channel 4 recognises the need to assess new publicly funded services, we are concerned that the current draft places too much emphasis on the economic/market impact of proposed services and not enough on their public value. Any assessment of

new services needs to strike a careful balance between both aspects. Public intervention can be expected – by its nature – to impact the market. The judgment should be whether that impact is justifiable in the context of the cultural, social and democratic value of the proposed new service. It is also worth noting that in some cases intervention itself can deliver economic benefits, for example by stimulating investment in new and innovative content and services which in turn support the broader economy investment in ‘commercial’ production companies and employment.

As the way in which consumers and citizens access content changes, it is entirely appropriate – indeed vital - for public service broadcasters to develop across new digital platforms and to offer new services. Any new services would need to demonstrate public value and be subject to appropriate checks and balances. However, as currently drafted, the Communication suggests that a stricter approach will be taken to the assessment of new non-linear services (in paragraph 56 the reference to ‘adequate safeguards’ appears to only refer to non-linear services). Channel 4 sees no reason why a special case is made for non-linear. Just as some linear services may be deemed to be unsuitable for public funding, so will some non-linear activities – likewise some non-linear services will be justifiably funded through public funds just as some linear services are. Any proposed new service should be subject to the appropriate assessment put in place by the Member State – with no stricter test applied to non-linear services.

Furthermore, there cannot be a ‘one size fits all’ approach to the organisation of the assessment of proposed new services. It must be the responsibility of Member States to put in place appropriate mechanisms according to the individual characteristics of the broadcaster, taking into account matters such as the remit and level of funding involved. Indeed, it should be possible for Member States to put in place different assessment arrangements for different organisations. As such, Channel 4 does not believe that it is appropriate for the Communication to specify a requirement for interested parties to comment on proposed services (paragraph 58) – this should be for Member States to determine according to the organisation and the funding proposal in question.

The Communication should also make clear that the assessment arrangements relate only to those proposed new services that would receive public funding and not to services offered on a commercial basis under a dual-funded model. In the case of dual funded bodies, the assessment of publicly funded activities should itself be the means of ensuring that funding levels are appropriate and there is no unfair cross-subsidy. Such levels of scrutiny of commercially funded activities could severely limit commercial innovation and put those commercial ventures at a competitive disadvantage.

Proportionality

As argued above, the case for public funding on PSB activity will vary widely across and within Member States. As such, it is important that the same criteria are not applied across all Member States when decisions are being made about funding. Questions around proportionality and necessity will need to be considered against a number of factors, including the particular nature of the public service system, the funding model, the public value and the quality of provision. As long as the appropriate transparency and accountability mechanisms are in place, it should be justifiable to direct public

funding within a dual-funded model to those areas that clearly deliver public value and are not catered for by the market. The proportionality test should be based on the funding of the public service mission to which it relates. Moreover, it is important that there is sufficient flexibility within the framework to respond to the particularity of funding needs as they arise. As such, the Communication should only ever be treated as an interpretative guidance note, not as a substitute for primary legislation: the overriding principle must be to ensure that public funding is compliant with the Articles of the Treaty.

Channel 4 welcomes the Commission's acknowledgement that it is appropriate for some reserves to be retained. However, Channel 4 believes that any such provision must be linked solely to reserves built up in relation to the public funding received and the associated public service activity, and not to commercial revenue. In this regard, one of Channel 4's primary functions is the proper financial management of the Channel 4 Television Corporation to ensure its ongoing solvency. Accordingly, it retains reserves from its commercial activities as an appropriate financial safeguard. The Commission needs to strike the right balance between on the one hand ensuring that there is no over compensation where public funds are concerned and on the other hand allowing broadcasters to meet their fiduciary duties and determine the appropriate management strategy to ensure that finances are adequately protected. This observation is likely to be most relevant to dual funded public service broadcasters where the broadcaster also has a significant exposure to private market conditions.

Furthermore, it is questionable whether it is necessary to specify the level of reserves at all, particularly given the wide variations of funding levels across Member States (where, for example, a multi-billion euro-funded organisation has very different levels of funding to broadcasters in smaller markets or those subject to dual-funded models). The Communication already establishes a number of important principles around financial transparency. It should be a matter for Member States to decide whether to put in place limits on reserves, taking into account the level of funding involved and the characteristics of the broadcaster in question. In cases of alleged 'manifest error' in determining the funding needs, the Commission could be called on to intervene in an ex-post capacity.

Channel 4 is also concerned about the meaning around the time limits for the existence of exceptional reserves. The drafting suggests that the 'entrustment period' may not be longer than four years. If this is the intention, Channel 4 would be concerned that this is far too short a period to ensure stability and certainty. It should be a matter for Member States to put in place appropriate entrustment arrangements to safeguard public service broadcasting. In relation to the Commission's proposed time period for financial checking every four years, Channel 4 questions why this has been set at four years. In the UK, the BBC's funding is currently assessed around every five years. Channel 4 recommends that greater flexibility might be more appropriate 'at no more than every five years'.

We thank you again for the opportunity to comment on the draft Communication. We would be very happy to discuss our response further with you, or provide additional material, if you would find this useful.

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